APPENDICES.

APPENDIX I. Excerpt from "Brief of Complainant-Appellee" in the Circuit Court of Appeals in this case.

APPENDIX II. Quotations from cases.

I. "Although a constitutional question may be involved; yet, if the case also involves other federal questions, the defeated party may elect whether to go to the Supreme Court or to the Circuit Court of Appeals."

II. "The mere assertion of a constitutional question is ineffective to sustain a direct appeal to the Supreme Court under Section 238, Judicial Code; unless the question thus presented be actually substantial, really arising under the facts alleged in the bill of complaint, and not foreclosed by previous decisions of the Supreme Court."

APPENDIX I.

EXCERPT FROM "BRIEF OF COMPLAINANT-APPELLEE" IN THE CIRCUIT COURT OF APPEALS IN THIS CASE (pp. 5-8 of the certified copy filed in this Court with this motion).

"APPLICABILITY OF RULE TO PORTO RICO.—We now reach the question of the difference, if any, between Porto Rico and a State of the Union.

"It is an academic question whether the violation is one of the Federal Constitution insofar as it is extended to Porto Rico or of the Organic Act insofar as it adopts parts of the Federal Constitution.

"It is admitted that Congress, with its power to extend or withhold the application of parts of the Federal Constitution in Porto Rico, can authorize the Legislature of Porto Rico to tax imports in the original packages. The first real question is whether Congress has granted to the Legislature of Porto Rico the power to lay a tax on imports from foreign countries.

"Certain sections of the Foraker Act and Jones Act, namely secs. 15, 32 and 38 of the Foraker Act and secs. 3, 37 and 57 of the Jones Act, vest certain legislative power in the Insular Legislature. Other sections, namely sec. 14 of the Foraker Act and secs. 9 and 58 of the Jones Act, extend federal laws to Porto Rico. These sections must be construed together.

Sections 15, 32 and 38 of the Foraker Act are quoted in appellant's brief, p. 28. Section 57 of the Jones Act is as follows:

> "'That the laws and ordinances of Porto Rico now in force shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the Legislative authority herein provided for Porto Rico or by Act of Congress of the United States; and such legislative authority shall have power, when not inconsistent with this Act, by due enactment to amend, alter, modify or repeal any law or ordinance, civil or criminal, continued in force by this Act as it may from time to time see fit.'

"Section 37 of the Jones Act is substantially the same as Section 32 of the Foraker Act. Section 3 of the Jones Act, insofar

as it is applicable to this case, is similar to Section 38 of the Foraker Act.

"None of these sections gives a blanket authority to the Legislature of Porto Rico. Section 15 of the Foraker Act must be understood as authorizing only such legislation as is not inconsistent with the Foraker Act. This limitation is specifically contained in Section 57 of the Jones Act.

"Sections 32 of the Foraker Act and 37 of the Jones Act limit the authority to 'matters of a legislative character not locally inapplicable.'

"Appellant argues, page 29, of brief, that Section 38 of the Foraker Act, and by implication Section 3 of the Jones Act, contains 'a general grant of power to levy taxes for local purposes.' This section is not a general grant. It does not cover duties on imports from the continental United States, prohibited by Section 3 of the Foraker Act as continued in force by Section 58 of the Jones Act. Nor does it cover duties on imports from foreign countries. Nor income taxes, which, even before 1913, Congress could have imposed in the territory of Porto Rico under the territorial clause of the Federal Constitution.

"The question is whether Congress by the words 'taxes and assessments on property' meant more than would be generally understood thereby in the continental United States and whether Congress intended to authorize taxes interfering with foreign commerce.

"For the answer to this question we must examine not merely the restrictions in Sections 15, 32 and 38 of the Foraker Act and in Sections 3, 37 and 57 of the Jones Act, but also those sections which extend federal laws to Porto Rico.

"Section 9 of the Jones Act, following Section 14 of the Foraker Act, reads in part:

> "'That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States, except the internal-revenue laws • • • .'

"Section 58 of the Jones Act is as follows:

> " 'That all laws or parts of laws applicable to Porto Rico not in conflict with any of the provisions of this Act, including the laws relating to tariffs, customs, and duties on importations into Porto Rico prescribed by the Act of Congress entitled 'An Act temporarily to provide revenues and a civil government for Porto Rico, and for other purposes,' approved April twelfth, nineteen hundred, are hereby continued in effect, and all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed.'

"From the specific exception of internal revenue laws in Section 9 of the Jones Act, one would suppose that all other federal revenue laws were in force in Porto Rico. That is certainly so as to the federal tariff laws.

"Congress has apparently desired that the duties in Porto Rico and in the continental United States shall be uniform. Although the federal duties in Porto Rico go to the Insular Government the collection machinery is an integral part of the Customs Service of the United States and the federal tariff laws are applied in Porto Rico. Foraker Act, secs. 2, 3 and 4, continued by Jones Act, sec. 58. Congress certainly never intended that the Legislature of Porto Rico could impose additional import duties on top of the federal duties.

"Clause 2 of Section 8 of Article I of the Federal Constitution provides, in part:

> " 'No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws, • • • .'

"Although a more extended application has been given it by a century of judicial construction, this clause literally forbids only import taxes and export taxes. In the case of Porto Rico, Congress has covered the case of imports from foreign countries by providing, in Sections 2, 3 and 4 of the Foraker Act, for the application of the federal tariff acts. It covered the case of exports by the specific provisions of Section 38 of the Foraker Act and Section 3 of the Jones Act. What more should it rea-

sonably be required to do to indicate its intention that Porto Rico was to be limited in the same way as a State of the Union? Taxes on imports and taxes on exports are forbidden to States by Clause 2 of Section 8 of Article I of the Federal Constitution. Taxes on imports and taxes on exports are forbidden in Porto Rico by Sections 2, 3, 4 and 38 of the Foraker Act as continued by Section 58 of the Jones Act. The mere fact that different language is used in the Organic Act and the Federal Constitution is not significant. See *Kepner* v. *U. S.*, 195 U.S. 100 (1904), as to the Fifth Amendment.

"It was once argued that Clause 3 of Section 8 of Article I of the Federal Constitution did not apply to Porto Rico, but this Court answered that Congress never intended to give Porto Rico more power over its external commerce than a State of the Union would have. *Benedicto* v. *West India & Panama Cable Co.*, 256 Fed. 417 (C. C. A., 1st Circuit, 1919). The argument of appellant in the case at bar would have called for a contrary decision in the *Cable Company* case. The intention of Congress in the Organic Act and preceding federal statutes seems clearly to have been to put Porto Rico in the position of a State so far as that was reasonably possible. At least, Congress certainly never intended the Insular Government to have more power over matters affecting foreign commerce than a sovereign State of the American Union."

APPENDIX II.

QUOTATIONS FROM AUTHORITIES CITED.

I.

ALTHOUGH A CONSTITUTIONAL QUESTION MAY BE INVOLVED; YET, IF THE CASE ALSO INVOLVES OTHER FEDERAL QUESTIONS, THE DEFEATED PARTY MAY ELECT WHETHER TO GO TO THE SUPREME COURT OR TO THE CIRCUIT COURT OF APPEALS. (Par. D-(a), under "Point I," p. 8, of the foregoing Brief.)

"The first question which claims our attention relates to the jurisdiction of this court. Section 7 of the act of March 3, 1891, c. 517, 26 Stat. 828 (U. S. Comp. Stat. 1901, p. 550), which gives a right of appeal from an interlocutory decree granting or continuing an injunction or appointing a receiver, restricts it to cases 'in which an appeal from a final decree may be taken under the provisions of this act to the Circuit Court of Appeals,' so the question resolves itself into this: Is the case one in which an appeal from a final decree may be taken under the act of 1891 to this court? The appellee insists that it falls within the exclusive appellate jurisdiction of the Supreme Court, because it involves the construction and application of the Constitution of the United States and draws in question the constitutionality of a law of the United States. We need not refer at length to the statutory provisions or the cases which are claimed to sustain this insistence * * *, because further consideration and discussion of the subject are foreclosed by the recent decision of the Supreme Court in *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 407, 24 Sup. Ct. 376, 48 L. Ed. 496. That was a case in which diversity of citizenship did not exist, and where it was sought to recover certain moneys exacted and paid under protest as war revenue taxes, the right to their recovery being asserted upon the grounds that the act of Congress imposing them was violative of the Constitution, and that, even if valid, it did not, when rightly interpreted, authorize their collection. The contention was made that the judgment of the Circuit Court was not subject to review by the Circuit Court of Appeals, but only by the

Supreme Court. It was ruled otherwise. We quote from the opinion:

"Was the judgment of the Circuit Court subject to review only by this court, or was it permissible for the plaintiff to take it to the Circuit Court of Appeals? If the case, as made by the plaintiff's statement, had involved no other question than the constitutional validity of the act of 1898, or the construction or application of the Constitution of the United States, this court alone would have had jurisdiction to review the judgment of the Circuit Court. *Huguley Mfg. Co. v. Galeton Cotton Mills*, 184 U. S. 290, 295, 22 Sup. Ct. 452, 46 L. Ed. 546. But this case distinctly presented other questions which involved simply the construction of the act, and those questions were disposed of by the Circuit Court at the same time it determined the question of the constitutionality of the act. If the case had depended entirely upon the construction of the act of Congress—its constitutionality not being drawn in question—it would not have been one of those described in the fifth section of the act of 1891, and, consequently, could not have come here directly from the Circuit Court. As, then, the case, made by the plaintiff, involved a question other than those relating to the constitutionality of the act and to the application and construction of the Constitution, the Circuit Court of Appeals had jurisdiction to review the judgment of the Circuit Court, although, if the plaintiff had elected to bring it here directly, this court would have had jurisdiction to determine all the questions arising upon the record. The plaintiff was entitled to bring it here directly from the Circuit Court of Appeals for a review of the whole case. Of course, the plaintiff, having elected to go to the Circuit Court of Appeals for a review of the judgment, could not thereafter, if unsuccessful in that court upon the merits, prosecute a writ of error directly from the Circuit Court to this Court."

"As the present case, according to the bill exhibited in the Circuit Court, involves the proper construction of the statutes under which the fraud orders were issued and is not made to depend entirely upon the constitutional questions, it follows, from the decision to which we have just referred, that the case is one in respect of which the appellate jurisdiction of the Supreme Court is not exclusive, and that an appeal from the final decree may be taken to this court."

Harris v. Rosenberger, 145 Fed. 449, 451-452 (C.C.A. Eighth Cir.—VAN DEVANTER, J.; certiorari denied by Supreme Court, *same case*, 203 U. S. 591).

"From this analysis of the petition, it appears that the grounds relied upon by petitioner for his release involve, not only the constitutionality and validity of the act, but the construction and effect of state statutes, and the regularity and effect of proceedings taken to disqualify the petitioner from practicing on the reservation. If the case involved the constitutional validity of the act, or the construction or application of the Constitution of the United States, and nothing else, this court would have no jurisdiction of the appeal. It would have rested exclusively in the Supreme Court of the United States. *Spreckels Sugar Refining Co. v. McClain*, 192 U. S. 397, 407, 24 Sup. Ct. 376, 48 L. Ed. 496; *Harris v. Rosenberger*, 145 Fed. 449, 76 C.C.A. 225, 13 L. R. A. (N. S.) 762. But, as the case involves other questions not exclusively cognizable on appeal by the Supreme Court, the appellant had his election to bring it to this court, and it becomes our duty to entertain the appeal and dispose of it."

Hooper v. Remmel, 165 Fed. 336, 338 (C.C.A., Eighth Cir., ADAMS, J.).

II

THE MERE ASSERTION OF A CONSTITUTIONAL QUESTION IS INEFFECTIVE TO SUSTAIN A DIRECT APPEAL TO THE SUPREME COURT UNDER SECTION 238, JUDICIAL CODE; UNLESS THE QUESTION THUS PRESENTED BE ACTUALLY SUBSTANTIAL, REALLY ARISING ON THE FACTS ALLEGED IN THE BILL OF COMPLAINT, AND NOT FORECLOSED BY PREVIOUS DECISIONS OF THE SUPREME COURT. (Par. D-(b), under "Point I," pp. 8-9, of the foregoing Brief.)

"It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgments of state courts there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit; there must be some fair ground for asserting its

existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up. Thus in *Millingar v. Hartupee*, 6 Wall. 258, the Chief Justice (at page 261) said: 'Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power.' This case arose under the twenty-fifth section of the Judiciary Act, and jurisdiction was sought to be maintained upon the assertion that the validity of an authority exercised under the United States was drawn in question, and the decision was against its validity. It was held not sufficient to make the claim, but there must be some color of foundation for its assertion.

"In *New Orleans v. New Orleans Waterworks Company*, 142 U. S. 79, upon a motion to dismiss the writ of error on the ground that no Federal question was involved, it was said by the court (page 87):

'While there is in the amended and supplemental answer of the city a formal averment that the ordinance No. 989 impaired the obligation of a contract arising out of the act of 1877, which entitled the city to a supply of water free of charge, the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.'

"Again, in *Hamblin v. Western Land Company*, 147 U. S. 531, upon a like motion to dismiss the writ of error, the court said: 'It is doubtful whether there is a Federal question in this case. A real, and not a fictitious, Federal question is essential to the jurisdiction of this court over the judgment of state courts,' citing the two cases just above referred to.

"In *St. Joseph & Grand Island Railroad Company v. Steele*, 167 U. S. 659, it was said by the court (page 662):

'We cannot accede to the proposition that, because the acts of Congress, which authorized the construction of the bridge in question, gave the right to build a railroad and toll bridge, the conceded power of the State to tax did not extend to the bridge in both aspects. Nor can we agree that the making of such a contention raised a Federal question of a character to confer original jurisdiction in

the Circuit Court of the United States. Not every mere allegation of the existence of a Federal question in a controversy will suffice for that purpose. There must be a real, substantive question, on which the case may be made to turn.'

"Although the above case relates to the jurisdiction of the Circuit Court, yet, so far as this question is concerned, the principle is the same as to both courts.

"And in *Wilson* v. *North Carolina*, 169 U. S. 586, it was held that there must be a real and substantial Federal question existing in order to give this court jurisdiction to review a judgment of a state court, and if the question raised were so unfounded in substance that the court would be justified in saying there was no fair color for the claim that it was of a Federal nature, the writ would be dismissed.

"These cases show the rule and its limitations, and where by the record it appears that although a claim of a Federal question had been plainly made, if it also clearly appear that it lacked all color of merit, and had no substance or foundation, the mere fact that it was raised was not sufficient to give this court jurisdiction.

"We must look at the question submitted by the plaintiff in error in the light of these decisions for the purpose of determining whether there is any fair foundation for the several claims."

New Orleans Waterworks Co. v. *Louisiana*, 185 U. S. 336, 344-346.

"From the foregoing it results that a claim under the Constitution and laws of the United States was made and decided in the court below, and if the fact that such a claim was formally made and disposed of below, without reference to its substantial foundation, determines the question of jurisdiction, the motion to dismiss must be denied. But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. 'There must be a real, substantive question on which the case may be made to turn,' that is, 'a real and not a merely formal Federal question is essential to the jurisdiction of this court.' Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely

devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail. *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 345, and authorities there cited."

Eq. Lf. Assur. Soc. v. *Brown*, 187 U. S. 308, 311 (WHITE, J.).

"It is settled that the mere averment of a constitutional question is not sufficient, where the question sought to be presented is so wanting in merit as to cause it to be frivolous or without any support whatever in reason. *Fayerweather* v. *Ritch*, 195 U. S. 276, 299. We think that the alleged violations of Federal right based upon the Fourteenth Amendment were so unsubstantial and devoid of merit that they furnish no real support to the contention that the decree of the Circuit Court of Appeals was not final. From this it follows that the motion to dismiss must prevail."

Farrell v. *O'Brien*, 199 U. S. 89, 100-101.

"If the jurisdiction of the District Court was invoked on the ground of diversity of citizenship, and the averment as to a right arising under the Federal Constitution or statutes was unsubstantial and without real merit, either because of its frivolous character upon its face, or from the fact that reliance was based upon a claim of Federal or statutory right denied by former adjudications of this court, then the appeal to this court must be dismissed. *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 576; *Equitable Life Assurance Society* v. *Brown*, 187 U. S. 308, 311."

Merriam Co. v. *Syndicate Publishing Co.*, 237 U. S. 618, 621 (DAY, J.).

"But mere reference to a provision of the Federal Constitution, or the *mere assertion of a claim under it, does not authorize this court to review* a criminal proceeding; and it is our duty to decline jurisdiction *unless the writ of error presents a constitutional question substantial in character* and properly raised below" (italics ours).

Sugarman v. *United States*, 249 U. S. 182, 184.

"These were writs of error issued directly to the District Court under Section 238 of the Judicial Code to

review sentences of fine and imprisonment on the ground that they were cases in which the constitutionality of the National Prohibition Act, under which the convictions were had, was drawn in question. In addition to the constitutionality of the Prohibition Act, the assignments of error raised many questions as to the admissions of evidence and the charge of the court. We held that in view of our previous decision affirming the validity of the Prohibition Act (*National Prohibition Cases*, 253 U. S. 350), the plaintiffs in error were precluded from raising the question again and basing thereon a claim of jurisdiction for a writ of error under Section 238, that the question made was, therefore, not substantial but frivolous, and that the writ should be dismissed for want of jurisdiction on the authority of *Sugarman* v. *United States*, 249 U. S. 182, 194, and cases cited. *Heitler* v. *United States*, *post*, 703. This conclusion made it impossible for us to consider the other errors assigned."

Heitler v. *United States*, 260 U. S. 438, 439 (TAFT, CH. J.); *cases transferred to the Circuit Court of Appeals*; *ib.*, *at pp.* 439-440).